FILED
JUL 22 1994

No. 93-2068

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and LOYE W. MILLER, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MICHAEL L. MARTINEZ *
STEVEN D. GORDON
HOLLAND & KNIGHT
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Attorneys for Respondents
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly applied a heightened pleading standard to petitioner's *Bivens* claims that required petitioner to produce direct evidence of an unconstitutional motive in order to avert summary judgment and dismissal.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
ARGUMENT	7
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Creighton, 483 U.S. 635 (1987) 8
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*
Black v. Lane, 22 F.3d 1395 (7th Cir. 1994) 12
Bombliss v. Lee, No. 93-1220, 1994 WL 117970 (7th Cir. April 6, 1994) 12
Branch v. Tunnell, 14 F.3d 449 (9th Cir.), *cert. denied*, 62 U.S.L.W. 3842 (June 20, 1994) 10, 13
Butz v. Economou, 438 U.S. 478 (1978) 9
Chapman v. City of Detroit, 808 F.2d 459 (6th Cir. 1986) 10
Davis v. Passman, 442 U.S. 228 (1979) 12
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 8, 9, 10, 14
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir.), *cert. denied*, 470 U.S. 1084 (1985) 10
Holland v. United States, 348 U.S. 121 (1954) 10
Hunter v. Bryant, 112 S. Ct. 534 (1991) 8, 9
Jordan By Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) 13
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993) 12, 13
Martin v. D.C. Metropolitan Police Dep't., 812 F.2d 1425 (D.C. Cir. 1987) 7, 8, 11
Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 11
Mitchell v. Forsyth, 472 U.S. 511 (1985) 8, 9, 10
Oropallo v. Parrish, No. 93-1953, 1994 WL 168519 (1st Cir. May 5, 1994) 12
Siegert v. Gilley, 895 F.2d 797 (D.C. Cir.), *aff'd on other grounds*, 500 U.S. 226 (1991) 8, 9
Whitacre v. Davey, 890 F.2d 1168 (D.C. Cir.), *cert. denied*, 497 U.S. 1038 (1990) 8
Wyatt v. Cole, 112 S. Ct. 1827 (1992) 9

STATUTES AND FEDERAL RULES

18 U.S.C. § 2511 5
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2671, *et seq.* 5

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 1983	12
28 C.F.R. §§ 540.61-540.63	3
28 C.F.R. § 540.64	3
28 C.F.R. § 541.22	3
28 C.F.R. § 541.22(a)	4
Fed. R. Evid. 407	11
Fed. R. Evid. 408	11
Fed. R. Evid. 409	11
First Circuit Local Rule 36.2(b)6	12
Seventh Circuit Rule 53(b)2	12
MISCELLANEOUS	
60A Am. Jur. 2d §§ 96-97	11
McCormick on Evidence, (4th ed. 1992)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2068

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and LOYE W. MILLER, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 6 F.3d 789. The order and opinion denying petitioner's suggestion for rehearing *en banc* (Pet. App. 64a-75a) are reported at 17 F.3d 1525. The opinion of the district court (Pet. App. 44a-63a) is reported at 774 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993, and a petition for rehearing was denied on April 1, 1994 (Pet. App. 79a). The petition for a

writ of certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. This is a *Bivens*[1] action, in which petitioner, a former federal prisoner,[2] seeks damages from respondents, J. Michael Quinlan, the former Director of the Federal Bureau of Prisons ("BOP"), and Loye W. Miller, Jr., the former Director of Public Affairs for the U.S. Department of Justice. Petitioner alleges, *inter alia,* that Quinlan and Miller conspired to violate his First Amendment rights when they allegedly caused him to be placed in administrative detention because of the content of his speech.

The facts are largely undisputed. Pet. App. 3a, 7a. Approximately two weeks prior to the 1988 presidential election, petitioner told Nina Totenberg, a correspondent for National Public Radio, that he had sold marijuana to then vice-presidential candidate Dan Quayle in the early 1970s while Quayle was in law school. Totenberg did not report the story because she could not corroborate it. C.A. App. 79. Petitioner then offered the story to NBC News, which requested permission from BOP, one week prior to the November 1988 election, to interview and videotape petitioner. Although the NBC request was too late under BOP procedures, Quinlan intervened and directed the prison to accommodate NBC and expedite the interview. Pet. App. 3a. Thus, on November 4, 1988, four days prior to the election, NBC videotaped a four-hour interview with petitioner that it never aired. *Id.*

---

[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] At all relevant times, petitioner was incarcerated in the federal prison at El Reno, Oklahoma where he was serving a fifty-one year sentence for drug- and explosives-related charges. Pet. App. 3a. He was released from prison in February 1994.

The NBC taping was itself reported in a local newspaper and resulted in other news organizations seeking access to petitioner. To accommodate those requests, the acting warden scheduled a press conference for petitioner at 7:00 p.m. the same evening. Pet. App. 4a. That afternoon BOP's Central Office in Washington, D.C. learned from a wire service inquiry that petitioner was scheduled to hold a "press conference" at the El Reno prison.[3] Quinlan ordered the press conference canceled because although BOP regulations permit media contacts by inmates and small press pools in some circumstances, neither the regulations nor BOP policy permit inmate press conferences. Pet. App. 4a.[4]

At approximately 11:30 p.m. on the evening of November 4, 1988, petitioner was placed in administrative detention—a "non-punitive single cell status"—for approximately one day. Pet. App. 5a.; 28 C.F.R. § 541.22. Petitioner had telephoned Totenberg that evening, "complained bitterly" about the cancellation of his press conference and expressed concern "about what the Justice Department might do to him." C.A. App. 80, 83. Totenberg then called Miller who recalls that she said petitioner believed that his own "safety was threatened by the hostile attitude of the prison authorities." *Id.* at 84. Subsequently, Miller telephoned his counterpart at BOP and informed him of the Totenberg call, including that petitioner believed "he was in danger." Pet. App. 5a; 53a.

BOP officials then informed Quinlan that petitioner had told Totenberg "he might be in some 'danger.'" C.A.

---

[3] Evidence in the record below reflects that Totenberg also telephoned Miller that afternoon and complained about petitioner holding a press conference. She indicated that she had given up her chance exclusively to report his story and that with a press conference another news organization was not likely to be so responsible. C.A. App. 82.

[4] *See* 28 C.F.R. §§ 540.61-540.63 (permitting limited media interviews of inmates); 28 C.F.R. § 540.64 (permitting small press "pools" with one press member from each major press medium).

App. 95. Based upon that information, Quinlan instructed El Reno prison officials to take the proper measures to ensure petitioner's safety, which he "clearly understood" to mean that El Reno officials would place petitioner in a non-punitive single cell status pending assessment of the threat. Pet. App. 5a.[5]

Upon hearing from other inmates that petitioner had been placed in detention based on a fear that he was in danger, Totenberg telephoned Miller. C.A. App. 80. When she learned during that conversation that she was being quoted as the source for saying petitioner was in danger, Totenberg told Miller it was "untrue" and denied having said "any such thing." Pet. App. 53a. At approximately 7:30 p.m. the next day, November 5, 1988, and three days prior to the election, petitioner was released from administrative detention and returned to the general prison population. He was released from detention after an investigation revealed no threat to petitioner's safety and after stating that he perceived no threat. Pet. App. 6a.

Petitioner was also placed in administrative detention on November 7, 1988 and December 22, 1988 for violating prison telephone regulations. Following administrative disciplinary hearings, petitioner was found guilty of the November 7 infraction and not guilty of the December 22 infraction. Quinlan and Miller had no involvement in those detentions. Pet. App. 6a-7a, 15a-17a.

2. On July 2, 1990, petitioner filed this action in federal district court against Quinlan in both his individual and official capacities, Miller in his individual capacity and the United States. The complaint asserted *Bivens*-

---

[5] See 28 C.F.R. § 541.22(a). The contemporaneous detention order indicates that petitioner was placed in detention based on information from Totenberg and the fact that the evening watch lieutenant had received information that other prisoners were saying that if petitioner had "snitched" on Quayle he might do the same to them. Pet. App. 5a.

type claims against Quinlan and Miller for alleged violations of the First and Fifth Amendments and various claims against the United States.[6]

Following some discovery, the respondents and the United States moved to dismiss or for summary judgment asserting, *inter alia*, that Quinlan and Miller are entitled to qualified immunity from suit in their individual capacities. The district court granted the motion in part and dismissed petitioner's Fifth Amendment and assault and battery FTCA claims. The court denied the motion as to all remaining claims. Pet. App. 44a-63a. In denying respondents immunity, the district court recognized that circuit precedent requires plaintiffs alleging unconstitutional motive to meet a heightened pleading standard. The court concluded that petitioner's allegations are "tangible and nonconclusory." Pet. App. 52a. Quinlan and Miller immediately appealed the denial of immunity.

3. a. A divided panel of the court of appeals reversed. The majority, in an opinion by Judge Henderson, held that circuit precedent required that when a plaintiff alleges a constitutional tort by a government official, and the outcome hinges on the official's intent or state of mind, the plaintiff must plead and produce direct evidence of an improper motive in order to withstand a motion to dismiss or for summary judgment. Pet. App. 8a-12a. As to the merits the majority concluded:

> Kimberlin relies only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by Quinlan and Miller; he has produced no direct evidence of unconstitutional motive for any of his detentions as required under our heightened pleading

---

[6] The claims against the United States were for assault, battery and false imprisonment under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.*, and for violation of Title III of the Organized Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511, arising out of the monitoring of Kimberlin's telephone calls. Pet. App. 44a-64a.

> standard. Such unsubstantiated claims as Kimberlin raises are precisely the sort that both qualified immunity and our circuit's heightened pleading standard are intended to cut short.

Pet. App. 17a.

Judge Williams concurred in the opinion but questioned the validity of the direct evidence test. Pet. App. 17a-19a. Judge Edwards dissented, stating that he saw no basis for a direct evidence standard and that he doubted the validity of any heightened pleading standard. Pet. App. 20a-21a.

b. The court of appeals denied rehearing and a suggestion for rehearing *en banc*.[7] Judge Williams, in a statement concurred in by Judges Silberman and Buckley, wrote that the "direct evidence" rule, although imperfect, preserved accountability for constitutional violations based on motive while safeguarding federal officials from the burdens and expense of unwarranted litigation.

> Drawing the line depends, under the Supreme Court's view of the *Bivens* remedy, on the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money.

Pet. App. 66a. Judge Williams concluded that it was "on balance preferable" to keep the direct evidence rule. *Id.* at 66a-67a. Judge Silberman also separately concurred. *Id.* at 67a.

---

[7] Petitioner argues that a majority of active circuit judges "favored rehearing than opposed it." Pet. 10. The record, however, reflects that only four judges voted in favor of rehearing *en banc*, Pet. App. 65a. Nevertheless, on June 23, 1994, the court of appeals denied respondents' request for a correction of Judge Edwards's statement in dissent that five judges voted in favor of *en banc* review and four against. Pet. App. 69a.

Judge Edwards, joined by Chief Judge Mikva and Judge Wald, reiterated in dissent the points made in his panel dissent. He questioned the viability of any heightened pleading standard and asserted that if a heightened pleading standard did apply, he saw no basis for a direct evidence requirement. *Id.* at 72a.

ARGUMENT

There is no merit to petitioner's contention that there is a conflict among the courts of appeals on the application of a heightened pleading standard in *Bivens* cases where motive is a component of plaintiff's claim; virtually every appellate court that has considered the issue has adopted some form of heightened pleading. Similarly, there is no merit to petitioner's contentions that the District of Columbia Circuit's standard conflicts with this Court's precedents or that heightened pleading standards do not apply to *Bivens* cases. The petition for certiorari should, therefore, be denied.

1. The District of Columbia Circuit, like nearly every other court of appeals, requires plaintiffs to meet a heightened pleading standard when they sue government officials in their individual capacities and improper motive is an element of the claim. Pet. App. 10a n.10 (citing cases). The District of Columbia Circuit has fashioned a direct evidence standard applicable to those cases:

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. *That is, some direct evidence that the official's actions were improperly motivated must be produced if the case is to proceed to trial.*

Martin v. D.C. Metropolitan Police Dep't., 812 F.2d 1425, 1435 (D.C. Cir. 1987) (emphasis supplied);

Whitacre v. Davey, 890 F.2d 1168, 1171 (D.C. Cir.), *cert. denied*, 497 U.S. 1038 (1990); *Siegert v. Gilley*, 895 F.2d 797, 801-02 (D.C. Cir.), *aff'd on other grounds*, 500 U.S. 226 (1991).

The heightened pleading standard was formulated following this Court's adoption in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) of an objective test for qualified immunity, whereby government officials are entitled to immunity from suit unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. In seeking to apply *Harlow*, the District of Columbia Circuit recognized that the objective test is problematic in cases where improper motive is alleged since motive encompasses a subjective component.

> The 'clearly established law' and 'objective reasonableness' facets of current qualified immunity doctrine tug in opposite directions where, as here, the 'clearly established law' itself contains a subjective component.

Martin, 812 F.2d at 1432.

On the one hand, this Court has repeatedly emphasized the heavy costs imposed by "insubstantial claims" and the need to protect federal officials from such claims with a vigorous application of qualified immunity "at the earliest possible stage in litigation." *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991); *Siegert*, 500 U.S. at 231-32; *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). On the other hand, because motive encompasses a subjective component, a *Bivens* plaintiff alleging unlawful motive could simply "allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery that *Harlow* intended to spare them." *Siegert*, 895 F.2d at 801.

Harlow's qualified immunity standard *presumes* the government official acted in good faith, as long as his objective conduct violates no clearly established right, and that presumption *is not* rebuttable by any evidence that the official actually intended to violate the law or in fact acted with an unlawful or malicious intent. Thus, *Harlow's* irrebuttable presumption of good faith could be read to bar any *Bivens* action that is predicated upon an unconstitutional motive. The court of appeals thought this result too harsh and sought by way of developing a heightened pleading standard to implement the command of *Harlow* to protect government officials from "insubstantial suits" while still providing a "realistic avenue for vindication of constitutional guarantees." 812 F.2d at 1433, quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978) and *Harlow*, 457 U.S. at 814. The result was the direct evidence heightened pleading standard.

The concerns that led the District of Columbia Circuit to formulate that test are no less compelling today. Indeed, this Court has repeatedly emphasized the key principles of immunity law that undergird the direct evidence test: (i) qualified immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526 (emphasis in original); and (ii) immunity "ordinarily should be decided by the court long before trial" and "at the earliest possible stage in litigation." *Hunter*, 112 S. Ct. at 536-37. Because substantial social costs, such as the burdens of discovery, the expenses of litigation, the diversion of government officials from their duties and the chill of prospective litigation, ensue when government officials are the targets of insubstantial suits, *id.*, qualified immunity was designed "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed on those defending a long drawn out lawsuit." *Siegert*, 500 U.S. at 232; *Wyatt v. Cole*, 112 S. Ct. 1827, 1833 (1992).

The District of Columbia Circuit's direct evidence standard is a thoughtful and appropriate response to the

concern that the application of a lesser pleading standard would effectively reimpose "precisely the burden *Harlow* sought to prevent." *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir.), *cert. denied*, 470 U.S. 1084 (1985). The direct evidence standard also furthers the important public policy of protecting a government official's ability to exercise discretion without the constant threat of personal liability based upon how the circumstances might be perceived by another. The import of this protection is great because the more delicate, important or controversial the policy decision, the greater the threat of suit based upon mistaken inferences. In short, the direct evidence standard allows government officials to act based on proper considerations, not based on whether their actions may be misconstrued by others and the threat of personal liability.

Although no other circuit has adopted the "direct evidence" formulation employed by the District of Columbia Circuit, the difference between the tests of the various circuits is merely one of degree that falls short of a conflict warranting review by this Court. See e.g. *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir.), *cert. denied*, 62 U.S.L.W. 3842 (June 20, 1994) (requires "nonconclusory allegations setting forth evidence of unlawful intent" with "specific and concrete" facts); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986) (conclusory allegations of unconstitutional conduct insufficient; "some factual basis" is required). Indeed, every formulation and variation of the heightened pleading standard is aimed at the same end—"to further the goal of qualified immunity, namely to protect government officials from the burdens of litigating 'insubstantial claims.'" Pet. App. 10a, quoting *Mitchell*, 472 U.S. at 526 and *Harlow*, 457 U.S. at 817-18.

2. There is no merit to petitioner's contention that the direct evidence test conflicts with this Court's precedents. To be sure, this Court has recognized in other settings that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evdence." *Holland v. United*

States, 348 U.S. 121, 140 (1954). The Court, however, was not addressing the issue presented here—requiring a litigant to adduce a certain type of evidence because of extrinsic policy considerations (here, immunity), *not* because it is adjudged intrinsically superior in terms of its probative value.

The direct evidence rule is not a standard based upon any perceived difference in the quality of direct versus circumstantial evidence. Rather, the policy reasons for qualified immunity—which this Court has repeatedly emphasized—explain the imposition of a direct evidence restriction in the *Bivens* context. As Justice (then Judge) Ginsburg noted in authoring *Martin*, it is not "extraordinary" to limit the inferences that can be drawn from evidence based upon substantive policy concerns. 812 F.2d at 1435-36. Antitrust, conspiracy and fraud cases all require something beyond bare allegations to survive summary judgment. *Id.*, citing, *inter alia*, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Other examples of such evidentiary limitations abound. Traditionally under the common law and federal law, the need to protect witnesses from being deterred from providing honest testimony has justified very strict evidentiary standards for proving perjury, generally requiring "direct" evidence and two witnesses. See 60A Am. Jur. 2d §§ 96-97. Quite frequently entire types of evidence are excluded from consideration based upon policy grounds wholly apart from the credibility, strength or probative value of the evidence. See e.g. Fed. R. Evid. 407 (remedial measures), 408 (offers of compromise), 409 (payment of medical expenses); 1 *McCormick on Evidence*, (4th ed. 1992), 313-67 (attorney-client privilege), 292-312 (marital communications privilege), 368-92 (physician-patient privilege).

The District of Columbia Circuit's formulation of the heightened pleading standard in no way conflicts with

this Court's teachings. Rather, it represents a logical and practical effort to apply *Harlow's* objective standard in cases where improper motive is at issue.[8]

3. Relying on this Court's recent decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), petitioner argues that there is now a split in the circuits regarding whether *any* heightened pleading standard can be applied. In *Leatherman*, this Court held that heightened pleading of claims against municipalities under 42 U.S.C. § 1983 is not required. The Court, however, expressly declined to rule on the issue of heightened pleading in qualified immunity cases. 113 S. Ct. at 1162. Emphasizing that the case before it involved a municipal defendant not entitled to immunity, the Court stated that "[w]e thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government defendants." *Id.*

There is no reason for this Court to review the decision below in light of *Leatherman*. No real circuit conflict has developed, despite petitioner's argument to the contrary. Two of the cases petitioner cites as authority for a conflict, *Oropallo v. Parrish*, No. 93-1953, 1994 WL 168519 (1st Cir. May 5, 1994) and *Bombliss v. Lee*, No. 93-1220, 1994 WL 117970 (7th Cir. April 6, 1994), are unpublished and applicable circuit court rules proscribe the citation of those cases as precedent.[9] The only case that arguably creates a conflict, *Black v. Lane*, 22 F.3d 1395 (7th Cir. 1994), states in passing that "a heightened pleading standard does not apply to § 1983

---

[8] The direct evidence test is not, as petitioner would have it, an impossible standard to meet. See e.g., *Davis v. Passman*, 442 U.S. 228, 230 n.3 (1979) (direct evidence in the form of a letter from defendant).

[9] First Circuit Local Rule 36.2(b)6 states that unpublished decisions may be cited only in related cases. Seventh Circuit Rule 53(b)(2) similarly provides that unpublished decisions shall not be cited or used as precedent except in the same or related cases.

claims." *Id.* at 1399. In context, that statement appears to be mere dictum and, in any event, the Seventh Circuit engaged in no analysis in citing *Leatherman* for that proposition.

By contrast, the Ninth Circuit—the only court of appeals, other than the court below, to address the issue in a published decision after *Leatherman*—likewise concluded that it should adhere to the heightened pleading standard established prior to *Leatherman*. See *Branch v. Tunnell*, 14 F.3d at 455-57; Pet. App. 9a n.9. Thus, it cannot seriously be maintained that there is a circuit conflict of any merit.[10]

4. A writ of certiorari is particularly unwarranted here because even without the application of the direct evidence test petitioner's case is, as the court below correctly held, based "only on inference and weak circumstantial evidence, notably the timing of events." Pet. App. 17a. Much of petitioner's case relies on inadmissible newspaper articles and unwarranted inferences. Indeed, the court of appeals concluded,

> the motive Kimberlin alleges—denying him access to the press—seems particularly unlikely since Kimberlin had already aired his allegations to NBC News and was permitted telephone contact with members of the media and others, even during his detention.

Pet. App. 14a. As such, this case presents precisely the kind of insubstantial claims this Court's qualified immunity precedent was designed "to cut short," *id.* at 17a, regardless of what pleading standard might be applied.[11]

---

[10] The Fourth Circuit, in *Jordan By Jordan v. Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994), has also analyzed *Leatherman*, and "express[ed] no view" as to whether heightened pleading standards apply to claims against individual government officials.

[11] Petitioner incorrectly asserts in footnote 11 of his petition that respondents have conceded that summary judgment was properly denied by the district court if petitioner's standard of proof

Finally, this is not a case, as was *Bivens*, where "it is damages or nothing." *Bivens*, 403 U.S. at 410; *Harlow*, 457 U.S. at 814. No matter how the petition for certiorari is resolved, petitioner still has unresolved claims against the United States pending in district court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MICHAEL L. MARTINEZ *
STEVEN D. GORDON
HOLLAND & KNIGHT
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Attorneys for Respondents

* Counsel of Record

JULY 1994

---

is applied. That statement is taken out of context and refers to petitioner's formulation of a preponderance of the evidence test he urged on the court of appeals—a standard more lenient than is applied to ordinary civil cases.